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in the

# Supreme Court

of the

# United States

**October Term, 1981**

THE FIRST STATE BANK OF MIAMI,
*Petitioner*

*vs.*

GOTHAM PROVISION COMPANY, INC. ET AL.,
*Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITIONER'S BRIEF

Robert J. Paterno
James C. Pilkey
Taylor, Brion, Buker & Greene
1451 Brickell Avenue
Miami, Florida 33131
305-377-6700
*Counsel for Petitioner*

## QUESTIONS PRESENTED

The Court below held that cattle sellers who had a lengthy history of entrusting their cattle to a meat packer despite knowledge they had not, and would not, receive payment for several weeks, qualified as "cash sellers" within the Amended Packers and Stockyards Act of 1921 (7 U.S.C. §196) and a regulation promulgated by the Department of Agriculture. It further held that, consistent with Congressional intent, these sellers are allowed to reach into the hands of a bank to recover full payment of their claims against a bankrup meat packer. The questions presented are:

1. WHETHER THE COURT BELOW ERRED IN HOLDING RESPONDENTS WERE "CASH" CATTLE SELLERS ENTITLED TO TRUST PROTECTION UNDER 7 U.S.C. §196 OF THE AMENDED PACKERS AND STOCKYARDS ACT OF 1921?

2. ASSUMING RESPONDENTS ARE CASH SELLERS UNDER THE ACT, DOES A THIRD PARTY ACTING IN GOOD FAITH AND IN THE ORDINARY COURSE OF BUSINESS HAVE ANY PROTECTION AGAINST BECOMING AN INVOLUNTARY INSURER OF A MEAT PACKER'S DEBTS?

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*Respondent.*

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## *PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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The petitioner, The First State Bank of Miami (hereinafter the "Bank") respectfully requests a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 11, 1982, rehearing denied on May 13, 1982.

The respondents are: Gotham Provision Company, Inc., a bankruptcy debtor ("Gotham"), and cattle sellers, Lykes Brothers, Inc. ("Lykes"), the United States Sugar Corporation ("U.S. Sugar"), Rogers Farms Inc. ("Rogers"), D.R. Kilpatrick ("Kilpatrick"), W.D. Roberts ("Roberts"),

Ronnie Perkins ("Perkins"), and Robbie Addison ("Addison"). The United States Department of Agriculture made an appearance at trial and as *amicus curiae* on appeal and is generally referred to as the Secretary or the USDA.

Reference to the appendix to this petition will be by the letter "A" followed by a page number (e.g. A-5). Record references will be by appropriate abbreviation.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported. *In re Gothan Provision Co.*, 669 F.2d 1000 (5th Cir. 1982). (A-1). The order of the District Court is unreported. *In re Gotham Provision Co.*, No. 79-247-Bk-JAG-W (S.D. Fla. July 30, 1980). (A-34 ). The findings of fact and conclusions of law of the bankruptcy court are reported in the West Company's new "Bankruptcy Reporter." *In re Gotham Provision Co.*, 1 Bankr. 255 (Bankr. S.D. Fla. 1979) (A-40 ).

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 11, 1982. A timely petition for rehearing was denied on May 13, 1982 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulation primarily involved are: 7 U.S.C. §196, 7 U.S.C. §204, 7 U.S.C. §228a, 7 U.S.C. §228b and 9 C.F.R. §200.201. Due to their length they are reproduced in the appendix to this petition. (A-54 ).

## STATEMENT OF THE CASE

This case arose as a result of a petition in bankruptcy filed by the Gotham Provision Co. The controversy involves the conflicting claims of the Bank as a duly perfected secured party and cattle sellers seeking to reach into the Bank's hands to grasp funds already paid against an outstanding loan.

The cattle sellers cause of action is based on the amended Packers and Stockyards Act of 1921. (Pub. L. 94-410, 90 Stat. 1249, 7 U.S.C. §181 et. seq.) (the "Act"). The amendments to the Act were designed to prevent the recurrence of packer bankruptcies and the sometimes harsh results these bankruptcies wreaked on certain cattle sellers under the Uniform Commercial Code as enacted by the various states. One of these amendments, now codified at 7 U.S.C. §196, provides the major focus of concern here. (A-54 ). Section 196 provides a means for a limited number of cattle sellers, those who sold their cattle in cash transactions, to take limited priority over a secured party in the event of a packer bankruptcy. To achieve this, the statute creates a trust in favor of cash sellers until such time as they are paid. A cash sale is one where the seller does not expressly extend credit to the buyer. 7 U.S.C. §196(c). To qualify for these benefits, the claimant must file with the Secretary of Agriculture within prescribed time limits. §196(b).

Gotham enjoyed longstanding business relationships with each of the cattle sellers. These relations began well before the passage of the amended Act and continued through Gotham's bankruptcy. (TR. 142).

Generally, the relevant particulars of each transaction between Gotham and the respondents would be arranged orally. These particulars would include such things as

manner or means of pick-up or delivery, whether a transaction was on a "live weight" or "grade and yield" basis,[1] and how and when payment was to be be made. (TR. 130-31, 457). Gotham paid respondents for their cattle by mailing them a check anywhere from three weeks to several months after the cattle were purchased. This payment practice originated before the amended Act and continued after its passage. There is no dispute between the parties about the length of time allowed for payment; the controversy centers on whether such sales constitute cash or credit transactions.

The Bank's relationship with Gotham worked in the following manner.

After Gotham purchased cattle, the cattle were slaughtered, dressed, placed in inventory and offered for sale to various customers such as grocery stores and butcher shops. Sales by Gotham to these customers were on both a cash basis, i.e., money or check in hand concurrent with delivery, and on a credit basis, i.e., time allowed for payment after delivery. (TR. 103-09). When cash sales were made, the money stayed with Gotham never finding its way to the bank. (TR. 108).

However, when Gotham's customers purchased on credit, Gotham would go to the Bank and receive 80% of the face value immediately. The Bank made these advances continually up to a $450,000 limit.

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[1] These terms are used to designate the manner in which purchase price is calculated.

In a live weight transaction, the purchase price can be determined immediately simply by weighing the animals and multiplying their total weight times the price per pound or per hundred weight, which the parties have agreed on.

In a grade and yield transaction, the purchase price is not determined until the animals are slaughtered, dressed and assigned a grade. The price per pound is commensurately higher.

The outstanding balance of Gotham's account fluctuated depending on such things as the number of credit sales and the rate at which the various grocery stores and butcher shops paid their bills. Reduction of the account was done on a routine, regular basis. (TR. 58-59). The Bank had no control over the amount outstanding at any given time. As long as Gotham was making credit sales the amount outstanding would stay at or near the $450,000 limit. When sales slowed or stopped, the balance outstanding was automatically reduced, assuming the grocery stores and butcher shops paid their bills.

Gotham filed its bankruptcy petition on March 9, 1979. Shortly thereafter, an agent of the Department of Agriculture went through Gotham's files. He deemed all of the respondents "cash" sellers and called them to inform them of this status. He also informed all respondents that if they intended to file a trust claim under 7 U.S.C. §196, notice must be filed with the Packer and the Secretary within the statutory period. The timeliness of certain claims has been litigated and the Bank will not raise this issue before this Court.

Throughout this entire sequence of events, the Bank continued to operate in the normal course of business. The Bank continued advancing funds against accounts receivable until March 16, 1979. (TR. 71). From the period beginning February 12, 1979, through bankruptcy, these advances totalled $751,000. (Sept. 7, TR. 211). These funds, representing the proceeds of Gotham's inventory, went directly to Gotham. Where this money went from there has not been determined. Upon learning of the bankruptcy, the Bank immediately froze all accounts. (TR. 67). The amount of the loan still outstanding is $112,330, plus interest. (TR. 63).

Thereafter, pursuant to court order, the Bank established a special escrow account to collect receivables. At the time of trial, there was $74, 439 in this account. (TR. 65). An additional $26,201 which should have gone into this account was taken by Gotham and placed in its "debtor-in-possession" account. (TR. 173-74).

On April 20, 1979, the Bank instituted an adversary proceeding under the Bankruptcy Act to determine the validity, priority and extent of its lien on the escrow fund. The cattle sellers took no action against Gotham but instead counterclaimed seeking to reach into the hands of the Bank to obtain payment in full.

On October 26, 1979, the Referee rendered the decision subsequently affirmed by the District Court. He found that even under these facts the cattle sellers were cash sellers, and that by virtue of that status and a statute regulating packers, the Bank was liable for repaying Gotham's debts plus costs and interest. The Fifth Circuit affirmed.

## REASONS FOR GRANTING THE WRIT

### *I. This Is a Case of First Impression Raising Significant and Potentially Recurring Questions About the Amended Packers and Stockyards Act of 1921.*

This is a case of first impression twice over. It is the first case dealing with the amended Packers and Stockyards Act of 1921 to reach the courts of appeal. It is also the first case where cattle sellers have relied on the Act in attempting to reach into the hands of a third party to secure payment for their cows.

As in Justice Cardozo's proverbial hard case, this case presents fertile grounds for making bad law. On one hand, the Bank has the unenviable task of arguing against cattle

sellers a statute admittedly passed to protect cattle sellers. On the other hand, should the cattle sellers prevail, no bank can risk the potentially enormous liabilities the Fifth Circuit decision imposes, and it appears Congress has protected cattle sellers by destroying their marketplace. The petitioner believes the Act, if properly interpreted, is a remarkably useful piece of legislation capable of balancing all competing interests. However, a proper interpretation will have to come from this Court.

There are several reasons why this Court should grant a writ of certiorari and strike the final balance. The reasons are simple and require little amplification.

As evidenced by repeated passages in the legislative history, Congress has attached great significance to the Act.

> Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance.

[1976] U.S. Code & Cong. Adm. News 2267, 2272.

Right or wrong, the Fifth Circuit's decision will have maximum impact on the day-to-day operations of the multi-billion dollar livestock industry. Though they may not be aware of it, the American public will also be affected every time they purchase meat. The ability of a meat packer to obtain credit and the cost of such credit is at stake in these proceedings. The outcome of this case will be reflected on meat counter price tags.

The USDA has made an appearance at every stage of these proceedings. The Secretary filed a motion for leave to participate in oral argument as *amicus curiae*. Pursuant to F.R.A.P. 27, the Secretary was required to list "extraordinary reasons" why participation should be allowed. Among

these reasons were the significance of this case as one of first impression in the courts of appeal and the need to establish a national standard for administering the statute.

This Act also squarely presents one legislative response to the conflict between farmers and secured lenders. This situation is currently of great national concern and is the subject of numerous bills pending in both houses of Congress.

Farmer Joseph Cryts captured the public eye when he removed his soybeans from a bankrupt grain elevator and sold them despite a court order that those soybeans were part of the bankrupt's estate. Because of the inequities of this situation, a federal grand jury refused to indict Cryts.

Several bills and resolutions have been introduced as a result of the Cryts incident. *(See e.g.,* S.2486, H.R. 6034, H.R.6335, H.R.6452 and H.R.6461, all 97th Cong. 2d Sess. (1982). Still more bills are being filed. Although petitioner does not know whether any of the proposed bills will use it as a model, the amended Act was a response to similar inequities which confronted cattle sellers. Unfortunately, the Fifth Circuit decision makes the amended Act as inequitable for third parties dealing with meat packers as prior law was for cattle sellers. We have traversed from one extreme to the other when clear Congressional intent was to find a middle ground. That middle ground is readily available but can only be supplied by this Court.

Finally, the Fifth Circuit decision is open to serious dispute for both legal and policy reasons. The present and future problems this decision creates are substantial and promise to reoccur. To illustrate, the remainder of the petition presents a stylized history of the Act and the future ramifications of the Fifth Circuit decision.

## *II. The Fifth Circuit Decision Renders the Amended Act Unworkable and May Recreate the Very Evil Which Prompted Passage of the Original Act.*

In 1974, this Court decided *Mahon v. Stowers*, 416 U.S. 100 (1974). In *Mahon*, the respondent cattle seller was left unpaid when a meat packer went bankrupt. In an effort to gain priority over secured creditors, the cattle seller claimed he was the beneficiary of a trust created by the Packers and Stockyards Act. The Fifth Circuit agreed, but this Court reversed holding that in the absence of any specific mention of such a trust in the Act, state law priorities would control. *Id.* at 111.

That same year a depressed economy led to a rash of meat packer bankruptcies. In many instances, secured creditors escaped unharmed while unpaid cattle sellers remained unpaid.

> Producers and farmers have the right by law to reclaim items sold to a bankrupt party. But when the livestock producer sells to a packer, it is often impossible for him to reclaim his livestock. In the five to seven days before a bad check bounces the producer's steer is a steak on a dinner table or a McDonald's hamburger.
>
> The bonding (§204) and trust provisions (§196) are specifically aimed at this problem.

42 Fed. Reg. 49, 926 (1977) (Remarks of Sen. Clark).

It was to counter the inequities inherent in this situation that Congress passed the amended Act.

After extensive hearings detailing the positions of the various affected industries, Congress came up with H.R.

8410 which was subsequently passed into law.

> What is needed... is legislation that will afford a measure of protection to the livestock producer and feeder and yet not be so restrictive as to reduce competition in the livestock as to reduce competition in the livestock slaughtering business. H.R. 8410 accomplishes this dual objective.

[1976] U.S. Code Cong. & Adm. News, 2267, 2279

The reasons Congress acted are easily typified as follows. A packer receives a loan from a bank for $400,000. To secure repayment of this loan, the packer grants the bank a security interest in its inventory, accounts receivable and the like.

At the time of the loan the packer had an inventory worth $500,000. If the packer depleted that inventory by selling to a local grocery store, the resultant debt owed by the grocery store to the packer replaced the inventory as security for the bank loan. Ideally, the combination of inventory and accounts receivable would always meet or exceed the $500,000 level. However, as the years go by the maintenance of this level is sometimes only an ideal and a bank, deeming itself insecure, would foreclose on its security. Before the amended Act, state law afforded a bank priority over cash cattle sellers.

Under these circumstances, such results were unduly harsh and unfair. For example, on Monday, a cattle seller delivers cattle to a packer receiving a check for the purchase price. Before the check is even deposited for collection, the cattle are slaughtered, become inventory and the seller loses the ability to reclaim his product if the check should bounce. Thus, a bank foreclosing an old loan on Tuesday reaped the full benefits of the seller's labor without providing any new value.

To remedy this inequity, Congress passed several amendments to the Act including 7 U.S.C. §196. Section 196 requires that all livestock purchased by a packer in cash sales and all inventories, receivables *or* proceeds derived from cash sales be held by the packer as trustee until full payment is received by such cash sellers. Further, the Act requires a packer to pay all cattle sellers on a cash basis if they so desire. 7 U.S.C. §228b. Additionally, Congress increased the scope of the term packer, 7 U.S.C. §191; required packers to be bonded, 7 U.S.C. §204; gave cattle sellers a private cause of action against packers, 7 U.S.C. §209; and gave the Secretary authority to obtain injunctive relief, 7 U.S.C. §228a.

Now, in the typical case, the bank's security interest attaches only to that portion of the inventory or receivables not derived from cash sales. The remainder of the inventory, receivables *or* proceeds is held by the packer as trustee.

Congress intended the net effect of these amendments to be a carefully balanced bill. "This is not an anti-packer bill or pro-producer bill, it is a bill that we believe is carefully balanced, addressing the problem to provide for a good, safe market and a safe market is what will best serve the consumer." Cong. Rec., May 6, 1976, P. H4011 (Remarks of Rep. Hightower).

In this balanced market, everything moves with dispatch. In simplest terms, if everyone pays as they go, bankruptcies are unlikely to occur, but if bankruptcies do occur, no one is likely to be hurt too badly.

At this juncture, the role played by the Bank in the instant case must be examined. This case does not present the situation where a bank relies on its secured antecedent debt to gain priority over a producer. Instead, the First State Bank was providing a service not only endorsed but

essential under the amended Act.

A large portion of a packer's sales to grocery stores and the like are on a credit basis. As the Justice Department noted during the hearings on the proposed bill, packers, unlike cattle sellers, cannot demand "cash only" from their customers. Any attempt to do so would be an anti-trust violation. *Proposed Amendments to the Packers and Stockyards Act of 1921; Hearings on H.R. 8410 and Related Bills Before the House Sub. Comm. on Livestock and Grains of the House Comm. on Agriculture,* 94th Cong. 1st Sess. 1-194 (1975). Therefore, the packer must have a method of turning its credit sales into immediate cash in order to pay its cash cattle sellers on the immediate basis envisioned by the Act. 7 U.S.C. §228b. This was the service provided by the Bank.

Following each step of a hypothetical transaction demonstrates the way this service worked.

Monday - Gotham enters into a verbal agreement with a cattle seller to purchase 200 cows on a "grade and yield" basis. The cows are loaded onto trucks and shipped to Gotham's plant.

Tuesday - Early in the morning, the cattle are slaughtered, dressed, graded, weighed and placed in inventory. At this juncture, the purchase price is determined to be $100,000. If these cows were purchased in a true cash transaction, then, pursuant to 7 U.S.C. §228b, Gotham is required to transfer $100,000 to the cattle seller by the close of business on Wednesday.

Wednesday - Gotham takes the processed meat derived from the 200 cows out of inventory and sells it to a local grocery chain for $150,000. The grocery chain signs an invoice promising to pay for the meat in 30 days, thus

creating a receivable. At this point, Gotham has sold the meat it derived from the cows and is required to pay the cattle seller in a few hours, yet Gotham will not receive payment for its product for at least 30 days. To solve this dilemma, Gotham takes the receivable to the First State Bank of Miami. The Bank pays Gotham 80% of its face value or $120,000. The receivable is thereby turned into proceeds of the cattle sale and is returned to the packer. The packer is under a statutory duty to hold the proceeds in trust for the cattle seller. 7 U.S.C. §195.

All that is needed to complete the cycle is for the packer to oblige his trust by paying the cattle seller for his cows. In the instant case, Gotham chose not to do so. It dispatched the funds to points unknown. The respondents have made absolutely no attempt to collect the funds from Gotham eventhough they have a private cause of action which survives bankruptcy. See 7 U.S.C. §§191, 209 and *Fillippo v. S. Bonaccurso & Sons, Inc., 466* F.Supp. *1008, 1018* (E.D. Pa. 1978). Instead, they pursue the Bank.

There is no rationale for holding the Bank liable for Gotham's breach of trust. The packer is the statutory trustee, not the bank. At all times, the Bank operated in good faith and in the ordinary course of business. The Bank did nothing to precipitate any of the respondents losses. The net result of this judgment is that the Bank, and anyone else who makes the unfortunate mistake of dealing with a meat packer, is *a fortiori* transformed into a provider of trustee liability insurance.

This is not the result Congress intended. The legislative history makes it clear that the only way to provide insurance to cattle sellers "would be [by] pledging the full faith and credit of the United States to cover any unpaid for livestock. In reality, that is the only way you guarantee that no one will suffer any conceivable loss." *Report of Business*

*Meetings on H.R. 8410, House Comm. on Agriculture,* 94th Cong., 2d Sess. 129 (1976) (Remarks of Rep. Foley, Chairman).

For the questionable privilege of providing financing to a small meat packer, the Bank now finds itself liable for paying Gotham's debts. This result does not flow naturally from the statute; rather, the opposite is true. To reach this result, the courts below had to find: that Congress intended to stretch the definition of the term "cash sale" light years beyond its usual commercial meaning; that cattle sellers are not required to prove any of the money they are taking really belongs to them; that a cattle seller's acts and omissions can never amount to estoppel; and that, despite Congress' deliberate choice of a trust provision over other available remedies, principles of trust law do not apply.

If the courts below are correct in this interpretation of the Act, the following illustrates what Congress has apparently authorized.

A cattle seller and a packer agree to extensive sales over a one-month period. When asked how he wants to get paid, the seller tells the packer to hold the money for a couple of months so he can get capital gains treatment for the cattle. The packer hands him a "credit letter' conforming with 9 C.F.R. §200.201 and asks him to sign it "just to keep the Secretary of Agriculture happy." The seller says "sure, I'll send it to you in a couple of days," and, upon returning home, dumps the letter in the garbage can.

Shortly thereafter, the deliveries of cattle begin and continue on a daily basis. The packer slaughters the cattle and sells the meat to local grocery stores. The grocery stores promise to pay in 30-90 days. The packer takes the promise to the Bank and turns it into immediate proceeds.

As the sales continue, the packer receives more and more money now that is not due and owing until much later. He also sells out his inventory and, in the true fashion of rascals everywhere, decides to abscound. For the sake of argument, before abscounding, the packer calls up the seller and informs him of his plans. The seller says, "you can't do that, you owe me hundreds of thousands of dollars." In response, the packer agrees to a large "under the table" payment just to keep things quiet.

Several days later, the seller receives a phone call from the United States Department of Agriculture informing him that he is a cash seller. "I am?" says the seller. "You must be," says the USDA, "there's no credit letter on file, and if you want to preserve your trust rights, make sure we get a telegram by tonight." "But what good will that do," asks the seller? "The packer has abscounded, and he sold all his inventory." "That doesn't matter," says the USDA, "we'll take it from the bank." "But," says the seller, "isn't that where he got the money to abscound with in the first place?"

We need change the facts only slightly to make this "worst case analysis" and several situations in the instant case remarkably similar.

It is unlikely that Congress intended to pass an act so susceptible to abuse. It is equally unlikely that Congress intended to vest cattle sellers with the power to create secret liens traditionally abhorred by the law.

Under these circumstances, no lending institution can even remotely consider financing a meat packer. Any loan officer who undertakes such a commitment with knowledge of its possible results will be guilty of gross misfeasance for subjecting his employer to such a risk. Indeed, when the Act was first passed, many lenders removed themselves from the market rather than risk the chance that the courts would

properly limit its scope.

> Many financing institutions have simply refused to extend credit to meat packers, processors and distributors because of this uncertainty. [As to the scope of the §196 trust benefits]. Most sub-committee members view this development with grave concern and recommend that in the future such legislation be opposed.

Burke, *UCC Annual Survey: Secured Transactions*, 32 Business Lawyer 1133, 1154 (1977).

However, Congress manifestly did not intend to drive banks out of the business of financing packers. Congressman Thone, a chief proponent of Pub. L. 94-410, is credited with the following statement about §196:

> [I]t need not and should not prevent a packer from obtaining a loan on his livestock, meat products and accounts receivable, for normally the amount of unpaid cash sellers outstanding at any one time should not be very great.

Cong. Rec. May 6, 1976 at H4010-11.

The record reflects, Gotham, a comparatively small packer, had average purchases in excess of one million dollars during the requisite 30-day period. It is obvious that the chief proponent of the Act could not have made the above-quoted statement if Congress intended all sellers within any 30-day period be deemed cash sellers simply because they threw a piece of paper in a garbage can.

Nevertheless, according to the Fifth Circuit, a Bank has no way to protect itself, even under these circumstances, from becoming liable for its customer's breach of trust. If this decision stands, all banks, large and small, would be well advised to remove themselves from this market.

Without the service provided by the bank in the instant case, none but perhaps the very largest meat packers could afford to continue in operation. As previously noted, packers, unlike cattle sellers, do not have the statutory ability to demand that their customers purchase only on a cash basis. Therefore, most of their sales to grocery stores and the like will continue to be on a credit basis. Without this financing, the packers will lose the use of money owed on a sale for the 30 to 90 days it takes to receive payment. Under such circumstances, the viability of *any* commercial enterprise is sorely tested. However, even if a packer could afford to stay in business, it could never stay in compliance with the Act and its regulations. To stay within these tenets, a packer must have absolutely superior cash liquidity. With their money tied, packers will be unable to meet the demands of legitimate cash sellers. Without accounts receivable financing, all but the largest packers are likely to buy and sell themselves out of existence in very short order.

When this occurs, we will have recreated the very situation the Packers and Stockyards Act was designed to prevent. "The chief evil feared is the monopoly of the packers enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys." *Stafford v. Wallace,* 258 U.S. 495, 514-15 (1922).

Of course, even the largest of packing houses would be loathe to operate without accounts receivable financing. Therefore, they will seek a way to secure it. There would now be only one situation in which a bank would continue to finance a packer, and that is where all the cattle purchases were made on credit. Technically, this should not happen since a cattle seller who intends to sell on a cash basis has a statutory right to demand prompt payment with the concomitant causes of action if that right is refused. But, commercial realities being what they are, as the market

dries up and the large packing houses regain their former positions, few sellers will be likely to refuse.

It may take several years for these results to occur, but there is ample precedent for such wholesale changes in the meat industry. One such change in marketing practices is what led to the passage of the amended Act in the first place. [1976] U.S. Code Cong. & Adm. News 2267, 2270. Therefore, unless the court below erred in its holding, it appears Congress has wasted an inordinate amount of legislative and judicial time composing and passing an act that will ultimately leave cattle sellers in a worse position than they started in.

Under no circumstances could the Bank's arrangement with Gotham do anything but help cattle sellers. It could not, and did not, hurt these cattle sellers in any manner. Unlike the typical case which prompted passage of the Act, the Bank gave new value in the form of proceeds *after* every sale. According to the respondents' own expert witness, the bank gave Gotham $751,000.00, nearly three times the respondents' claims, during the period when the subject sales occurred. (Sept. 7 TR. 211). The breach of trust occurred when Gotham failed to hold these proceeds for the respondents.

If the Bank can be liable here then so is every single entity or person who did business with Gotham. The phone company, the IRS, Gotham's employees and Gotham's attorneys all received funds generated by cattle sales. The logical extension of the Fifth Circuit decision mandates that each and every person doing business with a packer, from banks to plumbers, must monitor the packer's books on a daily basis before performing any services on the packers behalf. This is the only way to insure that inventory you have already paid for, or money received for services rendered, will not be subsequently ripped from your hands by an

alleged cash cattle seller. *See e.g., Matter of Harmon,* 11 Bankr. 162 (Bankr. N.D. Tex. 1980). (Cattle sellers may take "unearned" attorney fees).

The Bank has committed no crime, precipitated no loss and has earned the money it was paid. Yet, the bank alone faces a $260,000 judgment. If the law affords no protection to third parties dealing with meat packers, the least due process requires is some notice. The statute itself provides nary a hint.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

ROBERT J. PATERNO
JAMES C. PILKEY
TAYLOR, BRION, BUKER & GREENE
1451 Brickell Avenue
Miami, Florida 33131 (305) 377-6700
*Counsel for Petitioner*

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